United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7437

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 75-7437

- X

SHIRLEY HERRIOT BROOKS, GLORIA JONES,
individually and on behalf of all others
similarly situated,

Plaintiffs-Appellants,

- against -

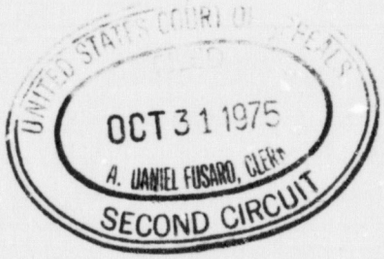
FLAGG BROTHERS, INC., individually and as
representative of a class of all others
similarly situated, HENRY FLAGG, individually
and as President of Flagg Brothers, Inc., THE
AMERICAN WAREHOUSEMEN'S ASSOCIATION OF REFRIGERATED
WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF
NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE
WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW
YORK, and LOUIS J. LEFKOWITZ, as Attorney
General of the State of New York,

Defendants-Appellees.

- X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS



The Legal Aid Society of Westchester County
By: Martin A. Schwartz, of Counsel
Lawrence S. Kahn, of Counsel
Evelyn Isaac, of Counsel
Attorneys for Plaintiffs-Appellants
56 Grand Street
White Plains, New York 10601
Tel: (914) 761-9200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
NO. 75-7437

----------X

SHIRLEY HERRIOT BROOKS, GLORIA JONES, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

- against -

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMEN'S ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Defendants-Appellees.

----------X

QUESTIONS PRESENTED FOR REVIEW.

1. Does the imposition and enforcement of the warehouseman's lien pursuant to New York Uniform Commercial Code, §§7-209 and 210, without affording the owner of the goods an opportunity to be heard at any time, constitute action under color of state law in violation of 42 U.S.C. §1983 and the Due Process Clause of the Fourteenth Amendment?

The court below answered this question in the negative.

2. Is the action a proper class action under Federal Rules of Civil Procedure 23(b)(2).

The court below did not determine this question.

Statement of the Case

Preliminary Statement

This is an action for injunctive and declaratory relief and for damages pursuant to 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3). The complaint challenges the constitutionality of New York Uniform Commercial Code, §§7-209 and 210. Section 209 authorizes warehousemen to impose liens by detaining bailed goods indefinately without providing the owner of the goods with an opportunity to be heard at any time. Section 210 authorizes warehousemen to enforce these liens by selling the goods without ever providing the owner of the goods with an opportunity to be heard.

Proceedings Below

The action was commenced as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure by the filing of a verified complaint by Shirley Herriot Brooks on September 21, 1973. (A.2,5-15).* The action was originally assigned to District Judge Charles H. Tenney, and was reassigned in 1974 to then District Judge Murray I. Gurfein. Upon Judge Gurfein's appointment

* The references to the Appendix are denominated A.

to the United States Court of Appeals, the action was reassigned to Judge Henry F. Werker.

In February, 1974, the parties stipulated to the propriety of the plaintiff and defendant class actions. (A.33-34a,121-123).* By decison dated June 25, 1974, Judge Gurfein granted the motion of Gloria Jones to intervene as a party plaintiff. The Attorney General of the State of New York was permitted on consent to intervene as a party defendant to defend the constitutionality of the contested provisions. (A.108). N.Y. Executive Law, §71. The American Warehousemen's Association, the International Association of Refrigerated Warehouses, the Warehousemen's Association of the Port of New York, and the Cold Storage Warehousemen's Association of the Port of New York were also permitted to intervene as party defendants. Brooks v. Flagg Brothers, 63 F.R.D. 409 (S.D.N.Y. 1974)(A.91-108).

* A conference on the class action was held on March 29, 1974 between the attorneys for the parties and Judge Gurfein. (A.2).

By notice of motion dated August 26, 1974, plaintiffs moved for summary judgment. (A.112-114). Because the court had never "so ordered" the class action stipulations, plaintiffs also moved for a class action determination. (A.113). By notice of motion dated September 19, 1974, defendant Flagg Brothers, Inc. and Henry Flagg moved to dismiss the action for failure to state a claim upon which relief can be granted. (A.173-174).*

By decision and order dated July 7, 1975, District Judge Werker denied plaintiffs' motion for summary judgment and granted defendants' motion to dismiss the complaint "for lack of jurisdiction." (A.205-206,207-223).** The court held that in imposing and enforcing the warehouseman's lien, the warehouseman does not act under color of state law withing the meaning of 42 U.S.C. §1983 and the Due Process Clause of the Fourteenth Amendment.

---

* On November 18, 1974, Judge Werker ordered the convening of a three-judge court. (A.3). By notice of motion dated April 22, 1975, plaintiffs moved to dissolve the three-judge court because the complaint does not seek to restrain "the action of any officer of [the] State in the enforcement or execution of a [State] statute...." 28 U.S.C. §2281. See Hernandez v. European Auto Collision, 487 F.2d 378, 382 (2d Cir. 1973). (A.109-110). This motion was granted in open court on June 26, 1975. (A.111).

** In its decision, the court did not deal with the class action aspect of the case, and its endorsed order reads "motion denied", presumably referring to the summary judgment motion. (A.205). The court, however, appears to have treated the case as a proper class action. (A.218).

In reaching this decision, the court recognized that the question presented "admits of no easy answer" and has resulted in divergent answers "from circuit to circuit, and even within the Second Circuit...." (A.211) The court held that neither this Court's majority nor concurring opinion in Hernandez v. European Auto Collision, 487 F.2d 378 (2d Cir. 1973) was controlling. (A.209-210) In addition, the court rejected plaintiffs' contention that the warehouseman acts under color of state law because (1) the statutory authorization to sell bailed goods to enforce the warehouseman's lien reverses the common law and grants the warehouseman a power he would not otherwise have, and (2) because the execution of a lien in New York constitutes the carrying out of a public function [Blye v. Globe - Wernicke Realty, 33 N.Y.2d 15, 20 (1973)]. (A.212-213).

Statement of Facts.*

A. Plaintiff Brooks

Plaintiff Shirley Herriot Brooks resides in White Plains, New York with her three minor children. (A.7,124). Her husband died in an automobile accident. (A.7,124).

* Since the district court granted defendants' motion to dismiss the complaint, this Court "must accept the allegations in appellants' complaints and supporting affidavits as true." Escalera v. New York City Housing Authority, 425 F.2d 853, 857 (2d Cir.), cert.denied, 400 U.S. 853 (1970); Scheur v. Rhodes, 416 U.S. 232, 236 (1974); Gardner v. Toilet Goods Ass'n., 387 U.S. 167, 172 (1967).

She has been employed as a nurse's aide and as a homemaker, earning approximately $100 per week. (A.7-8,124).

In June, 1973, an order of eviction was entered against Mrs. Brooks by the City Court of Mount Vernon. (A.8,124). On June 13, 1973, the City Marshall removed plaintiff's possessions from her apartment and informed her that defendant Henry Flagg, President of defendant Flagg Brothers, Inc. was the only person who could store her goods. (A.8,125).*

Defendant Flagg informed plaintiff that she would have to pay $65 per month to move and store her furniture. (A.9,125). Believing she had no other choice, she told Mr. Flagg to proceed with the moving and storage of her furniture and household possessions. (A.9,125).

After the goods were loaded onto one of Flagg Brothers' trucks, a moving man told Mrs. Brooks that she would have to pay $75 per month for storage, $75 for barrelling and platforming and $28 for fumigating, for a total of $178. (A.9,125). Plaintiff protested since she had been told that $65 was the entire cost, but again believing she had no choice, paid defendant Flagg $178. (A.9,125).

---

* A claim against the City Marshall pursuant to 42 U.S.C. §1983 and 1985 was dismissed without prejudice by agreement of the parties.

On June 15, 1973, plaintiff called defendant Flagg Brothers in order to find out how long they would store her goods for the $178 payment. (A.9,126). She was informed that she owed defendant Flagg an additional $156. (A.9,126). She was later given a "Combined Uniform Household Goods Bill of Lading and Freight Bill" which showed that Flagg Brothers regarded the $178 as a "deposit" and that there was a balance due of $156. (A.9, 16-17,126,130-131). When plaintiff told defendant Flagg that his prices were unreasonable, she was informed that on July 1, 1973 she would owe an additional $75 for storage for the month of July. (A.9-10,126). When plaintiff stated that her one month's storage payment of June 13, 1973 should run to July 13, 1973, defendant Flagg informed her that storage charges are incurred on a "per month" basis, and that even if her goods had been stored on June 29, 1973, an additional $75 would be due by July 1, 1973. (A.10,126,177).*

* Defendants' Rule 9(g) statement sets forth as disputed factual issues whether a valid contract existed between the parties, the rates agreed upon, and the reasonableness of the charges. (A.202-203).

On June 29, 1973, defendant Flagg informed plaintiff that she could have her goods if she paid the balance of the original bill, $150, plus $45. (A.10,120). Plaintiff, however, was not able to remove her goods at this time. (A.10,126-127).

On August 14, 1973, defendant Flagg's secretary informed plaintiff that she could remove her goods only if she paid $484 in cash. (A.10,127). On August 25, 1973, plaintiff received a letter from defendant Flagg Brothers stating:

> "Your account has to be brought up to date within 10 days of the date of this letter (Sept. 1, 1973) or your furn. will go up for sale. It, (your storage payments) have to be paid each month on the 1st and has to be kept up or your furniture will be sold. Your previous bal. from
> moving due 156.00
> storage for 7/73
> & 8/73 156.00 at $75 a month
>
> total due 306.00
> (A.10-11,18,127,132).

Accompanying this letter from defendant Flagg Brothers was a "Final Notice" informing plaintiff that $150 in storage costs were due and that "unless such payment is made we will be obliged to advertise your goods for sale at public auction." (A.11,19,127,133).

Plaintiff and her attorney wrote to defendant protesting the changing storage rates. (A.11,20-23, 127-128,134-137). Defendant Flagg's letter in response stated that plaintiff owed Flagg Brothers $482 and that "Her storage bill is past due and must be brought up

to date immediately to avoid the sale of her furniture, or before we initiate public auction proceedings." (A.11,24,128,138).

During this period, all of plaintiff's furniture and household goods were in defendant's warehouse. (A.11,25,28,139). The family had to sleep on the floor on the remaining mattresses they had, and had to get by without most of their clothes. (A.11,128). Plaintiff missed a month and a half of work because her nurses uniforms were held by Flagg Brothers. (A.128).

On September 21, 1973, plaintiff instituted this action for injunctive and declaratory relief and damages, claiming that Flagg Brothers' detention and threatened sale of her goods pursuant to New York Uniform Commercial Code, §§7-209 and 210 violate the Due Process Clause of the Fourteenth Amendment. (A.12). On January 24, 1974, defendant voluntarily returned all of the stored goods to Mrs. Brooks. (A.129).

B. Plaintiff-Intervenor Jones

Gloria Jones is a recipient of public assistance who resides alone in Mount Vernon, New York. (A.140).

In the fall of 1973, a judgment of eviction was entered against her by the City Court of Mount Vernon. (A.78,140). On November 26, 1973, the City Marshall appeared to remove her possessions. (A.78,140). As

with plaintiff Brooks, the City Marshall informed Mrs. Jones that she could only store her goods with defendant Flagg Brothers. (A.78,141). Employees of defendant Flagg Brothers then proceeded to load Mrs. Jones' goods and move them to a Flagg Brothers warehouse without her authorization. (A.78,141). Plaintiff was not advised of the rate of storage. (A.79,141).

In March, 1974, plaintiff was informed by an employee of Flagg Brothers that she would have to pay $600 to acquire her household goods. (A.79,141). She was further informed that if she had not contacted Flagg Brothers at this time, her goods would have been sold immediately thereafter. (A.79,86,141).

When plaintiff complained that defendant's rates were unreasonable and that she had not agreed to pay Flagg Brothers any sum for the storage of her goods, she was informed by an employee of defendant Flagg Brothers that she actually owed only $500, and that if she arranged to move her goods from the warehouse by her own means, the amount due would be reduced to $335. (A.79,83,142,145). This employee also informed plaintiff that if she were unable to pay the bill by April 12, 1974, her goods would be sold. (A.79,142).

During this period, plaintiff was forced to reside without most of her household goods, clothing and other possessions. (A.79,84,142-143,146). As a result, she suffered a nervous breakdown, was deprived of the companionship of her friends in her home, and had to purchase fabric to make replacement clothing. (A.142-143).*

In response to Mrs. Jones' motion to intervene as a plaintiff, defendants admitted the threat of sale, but stated that they had no present intention of selling the goods, "and if defendants do so decide, I will inform [Mrs. Jones' counsel] well in advance of any sale." (A.86).

Mrs. Jones' counsel subsequently received a letter dated May 21, 1974 from defendant's counsel stating:

> "Flagg Brothers, Inc. advises me that Mrs. Jones owes storage rental from January 1, through May 31 at the rate of $75.00 a month plus $35 auctioneer's fees or a total of $410.00.
>
> Mrs. Jones has been on notice since December 13, 1973 by letter of that date from the Social Services Department of Westchester County that it would not pay for her storage beyond one month.

---

* Defendants' Rule 9(g) statement sets forth as disputed factual issues whether a valid contract exists between the parties, the rates of storage and the reasonableness of the rates. (A.203-204).

> It is the position of Flagg Brothers, Inc. that the above charges should be paid upon release of the storage lot." (A.143,147).

By decision and order dated June 25,1974, Mrs. Jones was granted leave to intervene as a party plaintiff. (A.91-108). Subsequent efforts by counsel to resolve the dispute between the parties failed. (A.143-144,147-149). By letter dated June 28, 1974, Flagg's counsel informed plaintiff's counsel that "Mr. Flagg will take whatever steps he deems necessary to protect his interests." (A.144,149).

After the district court rendered its decision of July 7, 1975 dismissing the complaint for lack of jurisdiction, Mrs. Jones come to the Mount Vernon office of the Legal Aid Society and informed her counsel that she had paid defendant Flagg $1600 for the return of her goods; that she did not receive all of her goods from defendant Flagg; that some were received in a damaged condition; and that she did not make the $1600 payment voluntarily but only because of the threats of sale and the twenty month retention of the goods. (See also A.148.)

C. The Contested Statute

Section 7-209(1) of the New York Uniform Commercial Code grants the warehouseman "a lien against the bailor" on goods "in his possession for charges for

storage or transportation..., insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to the law." The warehousemen need not notify the bailor of the existence of the lien. He may detain the goods indefinately and only "loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver." N.Y. Uniform Commercial Code, §7-209(4).*

Section 7-210(1) of the New York Uniform Commercial Code authorizes the warehouseman to enforce his lien by selling the goods. In the case of consumer goods, the sale must be preceded by a notice to the owner of the goods containing an itemized statement of the claim, a description of the goods, a ten day demand for payment, "and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place." N.Y. Uniform Commercial Code, §7-210(2)(c). The "advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation...." N.Y. Uniform

* Plaintiffs recognize that under the majority decisions in Shirley v. State National Bank, 493 F.2d 739 (2d Cir. 1974) and Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974) the statutory codification in New York Commercial Code, §7-209 of the common law lien is not sufficient to constitute act on under color of state law. Plaintiffs, however, seek to preserve that question for possible review by the United States Supreme Court. See dissenting opinions of Kaufman, C.J. in Shirley and Bond.

Commercial Code, §7-210(2)(f).

Section 210 does not require the warehouseman to provide the owner of the goods with an opportunity to be heard at any time, and does not require the warehouseman to bring an action on his claim at any time.

POINT I

THE EXECUTION OF THE WAREHOUSEMAN'S LIEN PURSUANT TO N.Y. UNIFORM COMMERCIAL CODE, §7-210 CONSTITUTES ACTION UNDER COLOR OF STATE LAW.

The contested provisions of the Uniform Commercial Code authorize the warehouseman to impose a lien for charges allegedly due by detaining goods indefinately, and to enforce his lien by selling the goods, without affording the owner of the goods an opportunity to be heard at any time. N.Y. Uniform Commercial Code, §§7-209-210. Plaintiffs contend that the sale of bailed goods without affording the owner an opportuntiy to be heard constitutes action under color of state law in violation of the Due Process Clause. Hernandez v. European Auto Collision, 487 F.2d 378, 383-387 (2d Cir. 1973)(Timbers, C.J. and Lumbard, C.J., concurring).

In order to invoke 42 U.S.C. §1983 and the Fourteenth Amendment, the State must be "significantly involved" in the challenged activity. Moose Lodge v. Irvis, 407 U.S. 163, 173 (1972).* This requirement is met in the instant case because (a) section 210,

---

* The "under color of state law" clause in 42 U.S.C. §1983 [and its jurisdictional counterpart, 28 U.S.C. §1343(3)] is equivalent to the state action requirement of the Fourteenth Amendment. Shirley v. State National Bank, 493 F.2d 739, 741 (2d Cir. 1974), cert. denied, 95 S.Ct. 329 (1974), citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 n.7 (1970).

which grants warehousemen the power of sale, is in derogation of the common law and grants warehousemen a power they would not otherwise have, and (b) the exercise of the power of sale constitutes the execution of a lien, which in New York has historically and traditionally been the public function of the sheriff.

This Court has held that a significant factor in determining whether a party acts under color of state law is whether the contested statute merely codifies the common law, or whether it reverses the common law and grants a party a power or right he would not otherwise have. Compare Bond v. Dentzer, 494 F.2d 302 (2d Cir.), cert.denied, 95 S.Ct. 329 (1974) and Shirley v. State National Bank, 493 F.2d 739 (2d Cir.), cert.denied, 95 S.Ct. 65 (1974), with Hernandez v. European Auto Collision, 487 F.2d 378 (2d Cir. 1973). Where the statute merely codifies the common law, or where the creditor's remedy exists pursuant to contract, the statute is largely superfluous and the state is not significantly involved in the challenged activity. However, where, as here the statute reverses the common law and grants the creditor a remedy he would not otherwise have, the state is significantly involved in the challenged activity since the creditor acts under, and only under, the contested statute.

In Shirley v. State National Bank, supra, this Court stated that the "first inquiry must be, whether, absent a state statute, a Connecticut creditor would have the self-help remedy complained of." Id. at 742. The Shirley court concluded that since the right of repossession existed at common law and pursuant to the installment sales contract, the contested statute "did not create any right otherwise unavailable." Id. at 742. "[S]ince peaceful repossession existed at common law..., the mere codification of that right does not... constitute state action." Id. at 743.

The Court in Shirley distinguished the situation there from that in Reitman v. Mulkey, 387 U.S. 369 (1966):

> "The distinction is clear. The State of California [in Reitman] by express constitutional Amendment, permitted what was formerly prohibited. Here the right to private repossession always existed." Shirley v. State National Bank, supra at 744.*

Accord, Bond v. Dentzer, supra at 310; Adams v. First National Bank, 492 F.2d 324, 332 (9th Cir. 1973), cert. denied, 95 S.Ct. 325 (1974).

---

* In addition, Reitman was distinguished as arising in the context of racial discrimination. Shirley v. First National Bank, supra at 744.

Similarly, in Bond v. Dentzer, supra, this Court found that since the creditor's right to a wage assignment existed under the common law and pursuant to contract, "the statute has not given the assignee anything new...." Id. at 311. Accord, Phillips v. Money, 503 F.2d 990 (7th Cir. 1974), cert.denied, 420 U.S. 934 (1975); Smith v. Bekins Moving and Storage Co., 384 F. Supp. 1261 (E.D.Pa. 1974)(contract provision gave warehouseman right of sale). Cf. Anastasia v. Cosmopolitan National Bank, 44 U.S.L.W. 2164 (7th Cir. 1975)* and Davis v. Richmond, 512 F.2d 201, 203 (1st Cir. 1975), where the statutory broadening of the class of innkeepers entitled to a lien was only a "modest" change in the common law.

In sharp contrast to the right of repossession in Shirley and the wage assignment in Bond, the contested statute in the instant case grants the warehouseman a power he would not otherwise have - the power to enforce his lien by selling bailed goods. N.Y. Uniform Commercial Code, §7-210. This power did not exist under the common law and was not conferred by contract.

---

* In Anastasia, the Seventh Circuit expressly left open the validity of the sale provision of the Illinois innkeepers' lien statute.

Under the common law, the warehouseman, in exchange for his obligation to serve all who brought goods to him, acquired a possessory lien which gave him the right to retain possession of bailed goods until the storage charges were paid. 35 N.Y. Jurisprudence, Liens §11, p. 198; 62 N.Y. Jurisprudence, Warehouse Receipts, §§124-125; Brown, Personal Property, §108 at p. 519, §119 at pp. 588-592 (2d Edition, 1955). The warehouseman's common law rights, however, did not extend beyond the right to retain possession as a means of inducing payment. 62 N.Y. Jurisprudence, §125; Parks v. "Mr. Ford", 386 F.Supp. 1251, 1255 (E.D.Pa. 1975).* The common law lien

> "is simply a right on the part of the lienor to hold possession of the subject matter of the lien until the debt due him is paid. With the exception of the factor, the lienor has no right to sell the subject matter of the lien to reimburse himself for his debt unless such right is conferred expressly by statute or by special agreement between him and his debtor. The common law possessory lien is thus in

* The bailee had no power to bring a suit "for a decree for the sale of the bailment in satisfaction of the lien." Brown, Personal Property, supra at p. 589. Jewett v. City Transfer and Storage Co., 18 P.2d 351, 352 (1933), citing Jones on Liens §§976, 335. The lien creditor at times would resort to the "expedient of suing his debtor for the amount of the claim, and levying execution or attachment on the bailed goods." Brown, supra, at §121, pp. 602-603.

> essence merely a device to coerce the debtor into payment of his debts by the retention of his property from him until he pays. A sale by the lienor in attempted foreclosure of his lien is indeed, as to the owner of the goods, a conversion." Brown, Personal Property, supra at 588-589. (emphasis added). Accord, Hall, Possessory Liens in English Law, 19-20,67 (1917) Jones, Law of Liens, 642 (1894).

The warehouseman's right to enforce the common law lien by a sale of goods did not come into existence until the statutory enactment of the predecessors of New York Uniform Commercial Code, §7-210.* The statutory power of sale is thus "in derogation of the common law" [62 N.Y. Jurisprudence, Warehouse Receipts, §125, p. 747; Grafstein v. A. Santini Storage Co., 26 N.Y.S. 2d 125, 126 (N.Y.C. Ct.), aff'd, 42 N.Y.S. 2d 496 (App.Term 1941], would not

* According to the historical note to New York Commercial Code, §7-210 (McKinney's), the predecessor of section 210 was General Business Law, §118, which was derived from the Laws of 1907, c.732. While the warehouseman's rights have been extended by statute, there has been no commensurate expansion of the warehouseman's liability. The warehouseman's duty of care under New York Uniform Commercial Code, §7-204(1) is the same as it was under the common law and under prior statutes, i.e., reasonable care. 63 N.Y. Jurisprudence, Warehouses and Warehousemen, §30.

exist but for the challenged provisions, and indeed, would constitute an unlawful act if not for the contested statute. 62 N.Y. Jurisprudence, §125, p. 746; Brown, Personal Property, supra at §119, p. 590. Unlike the creditors' remedies in Shirley and Bond, when the warehouseman enforces his lien by selling bailed goods, he acts pursuant to, under, and only under the contested statute. See Klim v. Jones, 315 F.Supp. 109, 114 (N.D.Calif. 1970).

The court below held that as to those persons whose warehouse contracts "contained a sale-in-case-of-default provision, there is no state action." (A.218). In the cases of the plaintiff and plaintiff-intervenor, and undoubtedly many others, however, there were no contracts authorizing the power of sale. Defendant Flagg's threatened exercise of the power of sale against plaintiffs was only pursuant to section 210.*

---

* Defendant argued in the court below that since the power of sale can be conferred by contract, the statutory authorization is not significant state involvment. (Defendant Flagg's Memorandum, October 4, 1974 p.26). However, the critical inquiry for state action purposes is not whether the parties are free to agree to confer a remedy upon the warehouseman, but whether a remedy is available to the warehouseman absent contractual authorization.

The court below acknowledged that for persons such as plaintiffs, "defendants power of sale comes only from §7-210." (A.13). The court held that this was not a basis for a finding of state action in light of the Supreme Court's statement in Jackson v. Metropolitan Edison, Co., 419 U.S. 345, 357, 95 S.Ct. 449, 456-457 (1974) that:

> "Approval by a state utility commission..., where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.'"

The court in Jackson, however, did not state that a governmental order was a prerequisite to a finding of state action. Rather, the holding in Jackson was based on the fact that the Public Utilities Commission's action was entirely passive since the tariff in question had been "initiated" by the utility, "and not from the State," and was not specifically acted upon by the Commission. Jackson v. Metropolitan Edison Co., 95 S.Ct. supra at 457. In the instant case, unlike in Jackson, the state has taken an active and significant role by enacting the very basis of power for the contested act. As in Nixon v. Condon, 286 U.S. 73 (1932), "(I)f the state had not conferred it, there would be hardly

color of right to give a basis for its exercise." Id. at 85. Accord, Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 178 (1973)(Brennan and Marshall, J.J., dissenting)("[I]t is now well settled that specific governmental approval of or acquiescence in challenged action by a private entity indicates 'governmental action.'"); Public Utilities Commission v. Pollak, 343 U.S. 451 (1952). See also, Adickes v. S.H.Kress & Co., 398 U.S. 144, 196, 202 (1970)(Brennan, J., concurring in part and dissenting in part); Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970); Note; State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Col.L.Rev. 656, 664-665 (1974).*

Moreover, plaintiffs' contention that the warehouseman acts under color of state law is not based entirely on the statutory reversal of the common law and the authorization of a remedy which would not otherwise exist. Plaintiffs also rely upon the fact that the warehouseman's sale of goods pursuant to section 210 constitutes the execution of a lien - a function which historically and traditionally in New York has been the public function of the sheriff. The Supreme Court has held that state

* See also, Adickes v. S.H. Kress and Co., 409 F.2d 121, 132-133 (2d Cir. 1968)(Waterman, J. dissenting), rev'd and remanded, 398 U.S. 144 (1970).

action is present where "private individuals or groups are endowed by the State with powers or functions governmental in nature...." Evans v. Newton, 382 U.S. 296, 299 (1966)(park); Terry v. Adams, 345 U.S. 461 (1953)(political primary); Smith v. Allwright, 321 U.S. 649 (1944)(political primary). See also, Perez v. Sugarman, 499 F.2d 761, 764 (2d Cir. 1974)(child care organization); United States v. Wiseman, 445 F.2d 792, 796 (2d Cir.), cert.denied, 404 U.S. 967 (1971)(process server).

In Blye v. Globe - Wernicke Realty, 33 N.Y.2d 15, 19-20 (1973), the New York Court of Appeals found that the execution of the innkeepers' lien pursuant to New York Lien Law §181 constitutes action under color of New York state law because in New York "the execution of a lien" constitutes a function traditionally performed by the sheriff. The court stated that:

> "[I]n recent years, another theory of State action has emerged. It holds that the actions of private persons, when performing traditionally public functions, may be attributed to the State for purposes of the Fourteenth Amendment. (citations omitted).
>
> In this State, the execution of a lien, be it a conventional security interest (Lien Law, §207), a writ of attachment (CPLR art. 62), or a judgment lien (CPLR art. 52) traditionally has been the function of the Sheriff." Id. at 20. (emphasis added).

Accord, Hall v. Garson, 430 F.2d 430, 433 (5th Cir. 1970). "(T)he execution of a lien...has in Texas traditionally been the function of the Sheriff or constable); Johnson v. Riverside Hotel, 44 U.S.L.W. 2075 (S.D.Fla. 1975)(slip opinion, p.4)("The execution of the Landlord's lien in Florida was traditionally a function of the Sheriff."); Caesar v. Kiser, 387 F.Supp. 645, 647 (M.D.N.C. 1975)("The traditional governmental function of lien enforcement."); Adams v. Department of Motor Vehicles, 113 Cal.Rptr. 145, 520 P.2d 961 (Cal.Sup.Ct. 1974)("The State delegated ... the traditional governmental function of lien enforcement."). See also, Magro v. Lentini Brothers, 338 F.Supp. 464, 466 n.7 (E.D.N.Y.) (Mishler, D.J.), aff'd per curiam on opinion below, 460 F.2d 1064 (2d Cir. 1971), cert.denied, 406 U.S. 961 (1972).

While the question of whether an activity constitutes state action because it is a public function is a constitutional question involving the construction of the Fourteenth Amendment, the characterization by New York's highest court in Blye that lien enforcement traditionally has been a governmental function in New York is entitled to great weight. Jackson v. Metropolitan Edison, 95 S.Ct. supra at 454 ("The Pennsylvania courts have rejected the contention that the furnishing of utility services are either state functions or municipal duties.")

In New York, a judgment may be enforced by the levy and sale of the defendant debtor's goods by the sheriff. N.Y. CPLR, §§5232(b), 5233. Cf. N.Y. CPLR, §§6214, 6215. Section 5233 of the CPLR provides:

> "The interest of the judgment debtor in personal property obtained by a sheriff pursuant to execution... shall be sold by the sheriff at public auction at such time and place and as a unit or in such lots, or combination thereof, as in his judgment will bring the highest price...." N.Y. CPLR, §5233(a). *

Under the common law, the warehousemen often resorted to the "expedient of suing his debtor for the amount of the claim, and levying execution or attachment on the bailed goods." Brown, Personal Property, §121, pp.602-603. It is thus clear that Section 210, in authorizing the warehouseman to sell bailed goods, authorizes the warehouseman to perform a function which in general, and in the historical context of warehousemen, has been performed by the Sheriff. Compare, Bond v. Dentzer, supra at 311 ("The function of the wage assignment has always been that of private levy....")

---

* Under the common law, in the execution of a judgment where money was awarded the sheriff obtained a writ of fieri facus from the judge, commanding him "to make of goods and chattels of defendant the sum or debt recorded." At that point, the sheriff would take the goods, and sell the goods and chattels of the defendant until he has raised enough to satisfy the judgment and costs." Blackstone, Commentaries on Laws of England by George Clark 317 (1902).

The court below attempted to distinguish the decision in Blye v. Globe-Wernicke, supra on the ground that "(t)he liens referred to by the Blye court...all involve satisfaction of a debt having no particular relation to the goods executed upon." (A.212-213). This distinction is without constitutional significance. First, the critical issue is not the method of lien enforcement, but the governmental nature of lien enforcements. Moreover, the court below ignored the fact that prior to the existence of the statutory authorization of sale, the sheriff satisfied the debt by executing on the very goods which were the basis for the debt.*

Defendant Flagg argued in the court below that since the challenged statute and its antecedents have conferred upon warehousemen the power to execute the lien by sale of the goods since 1879, the execution

---

* The lower court's reliance on Melara v. Kennedy, 43 U.S.L.W. 2094 (N.D.Cal. 1974) is misplaced. In Melara, the sale of the goods by the warehouseman was not a public function since warehousemen in California always had the power of sale pursuant to a general state lien enforcement statute. Id. at slip opinion, p.5.

of the warehouseman's lien does not constitute the carrying out of a public function. (Defendant Flagg's Memorandum, October 4, 1974 p.37). The relevant inquiry, however, is not the length of time a statute has conferred the challenged power on ostensibly private persons, but rather the nature of the function being carried out.

Thus, the length of time the local "private" political organization had conducted pre-primaries in Terry v. Adams, 345 U.S. 461 (1953) or had determined the qualifications for primary elections in Smith v. Allwright, 321 U.S. 649 (1944) was not relevant in determining whether the ostensibly private political party's action constituted state action.* The critical inquiry was whether these organizations, operating as part of the state's election process, were exercising

* It is clear form the decisions in Terry and Smith that "private" political parties had carried out primary functions in Texas for many years.

powers governmental in nature. Because they were, the Supreme Court found that their actions were under color of state law.

Similarly, the New York Court of Appeals in Blye found that the execution of the inkeepers' lien constitutes state action, despite the fact that the New York innkeepers' lien law was enacted in 1909 and was derived from the Lien Law of 1897.* Thus, the execution of an innkeepers' lien is a public function in New York despite the fact that innkeepers have been executing their own liens since 1897. In Hall v. Garson, 430 F.2d 430, 439 (5th Cir. 1970), the Fifth Circuit found that the execution of a landlord's lien constitutes action under color of Texas state law because the execution of a lien "has in Texas traditionally been the function of the sheriff or constable." The Fifth Circuit reached this conclusion despite the fact that the challenged landlords' lien law was derived from a statute enacted in 1922. [Vernon's Civil Statutes of Texas Supplement 1922, Acts of 1919, 36 Leg. Ch. 110.] Thus, the execution of the landlords' lien is

* Indeed, the Court of Appeals described the innkeepers' lien law as a "hangover from bygone days." Blye v. Globe-Wernicke Realty, supra at 22 fn. 6, quoting from Fuentes v. Shevin, 407 U.S. 67, 103 (1972)(Justice White, dissenting).

a public function in Texas despite the fact that landlords have been executing their own liens since 1922. And, in United States v. Wiseman, 445 F.2d 792, 796 (2d Cir.), cert.denied, 404 U.S. 967 (1971), this Court found that the service of summons constitutes action under color of state law in New York because "the service of summons is essentially a public function." This conclusion was reached despite the fact that in New York private parties have had the power to serve a summons since at least 1848. See N.Y. CPLR, 2103(a), and its derivative statutes, N.Y.C.P.A., §220 enacted in 1920; N.Y.C.C.P. §425, enacted in 1876 and N.Y.C.P., Title V, §112 (Field Code), enacted in 1848.

The teaching of these cases is that the length of time a statute has delegated a function to ostensibly private persons is not relevant in determining whether the function is public or governmental in nature. The relevant inquiry is whether the activity involved is "a function public or governmental in nature which would have to be performed by the Government but for the activities of private parties." Perez v. Sugarman, supra at 764. See Jackson v. Metropolitan Edison Co., 95 S.Ct. supra at 454 (a "power...traditionally associated with sovereignty.") The execution of the ware-

houseman's lien clearly meets this test.*

In Hernandez v. European Auto Collision, 487 F.2d 378 (2d Cir. 1973), this Court considered the constitutionality of the sale provision of the New York garageman's lien statute. As the court below recognized, "[t]he statutes challenged in Hernandez are substantially similar to those in question here." (A.220). Comment: Future of Creditor's Remedies in New York: The Impact

---

* In addition, the storage of plaintiffs' goods was part of an eviction carried out by the sheriff. The sheriff has the legal obligation to remove the tenants' goods, Rasch, New York Landlord and Tenant, §1392; Ide v. Finn, 196 App.Div. 304, 187 N.Y.S. 202, 207 (1st Dept. 1921), and to store the goods in order to comply with the municipality's obligation to keep the sidewalks in a safe condition. See generally 26 N.Y. Jurisprudence, Highways, Streets and Bridges, §96. Cf. Annino v. Utica, 276 N.Y. 192 (1937).

The extensive state regulation of warehousemen is also relevant in determining whether state action is present. Male v. Crossroads Associates, 469 F.2d 616 621 (2d Cir. 1972), quoted in Shirley v. First National Bank, supra at 743. Most of the regulatory provisions governing warehouses and warehousemen are contained in Article 7 of the Uniform Commercial Code. Sections 101 to 210 of Article 7 of the Code regulate the business activities of the warehouseman, including the issuance, form, content, negotiation, transfer, alteration and loss of warehouse receipts [N.Y. Uniform Commercial Code, §7-204], termination of storage at the warehouseman's option [N.Y. Uniform Commercial Code, §7-206], the duty of keeping goods, other than fungible goods, separate [N.Y. Uniform Commercial Code, §7-207], altered warehouse receipts [N.Y. Uniform Commercial Code, §7-208], and the lien and sale of bailed goods [N.Y. Uniform Commercial Code, §§209-210]. The provisions of the Uniform Commercial Code are not exclusive. New York warehousemen are subject to other statutes regulating their activities. N.Y. Uniform Commercial Code, §§7-103, 10-104. Moreover, sections 209 and 210 of the Code regulate the challenged activities.

of Fuentes and Blye, 38 Albany L.Rev. 467, 478 (1974).

The decision of the court in Hernandez held that plaintiff has a "tenable contention" that the sale provision violates the Due Process Clause.* This Court thus "reverse(d) the dismissal of the complaint and... remand(ed) the case to the District Court with directions to try the case on its merits." Hernandez v. European Auto Collision, 487 F.2d 378, 383 (2d Cir. 1973)(emphasis added).

Moreover, the two judge concurring opinion in Hernandez "would direct the district court to declare the sale provision unconstitutional",based on the "conclusion...that the enforcement provision of the New York Lien Law is unconstitutional in that it permits the deprivation of a significant property interest without the opportunity for some type of a prior hearing." Hernandez v. European Auto Collision, supra at 383, 386 (Timbers, C.J. and Lumbard, C.J., concurring). Because action under color of state law is an essential prerequisite for subject matter jurisdiction under 28

* Plaintiff-Appellant briefed the state action question in Hernandez. Brief for Plaintiff-Appellant in Hernandez v. European Auto Collision, 10-11, fn.

U.S.C. §1343(3),* for stating a claim under 42 U.S.C. §1983 and for invoking the Fourteenth Amendment, ** the court in Hernandez would not have been able to direct the district court "to try the case on the merits", and the concurring opinion would not have been able to direct that the sale provision be declared unconstitutional, without finding that the garageman acted under color of the statutory sale provision. Compare, Shirley v. First National Bank, supra and Bond v. Dentzer, supra, where this Court did not reach the due process issues because the Court found that the creditors did not act under color of state law. Indeed, the concurring opinion in Hernandez specifically found that

> "The absence of that opportunity [to be heard] makes the statute a party to the deprivation of a significant property interest without the right to the basic protections of the Fourteenth Amendment." Hernandez v. European Auto Collision, supra at 586. (emphasis added).

---

* Shirley v. State National Bank, supra at 741. For the Circuit Court to order the case tried on the merits, its first obligation was to determine that the district court was possessed of subject matter jurisdiction. City of Kenosha v. Bruno, 412 U.S. 507 (1973); Clark v. Paul Gray, 306 U.S. 583, 588 (1939); Givens v. W.T.Grant Co., 457 F.2d 612, 613 fn. 2 (2d Cir. 1972), vacated on other grounds, 93 S.Ct. 951 (1973); Leathers Best v. S.S. Mormaclynx, 451 F.2d 800, 807 (2d Cir. 1971); Rock Island Millwork Co. v. Hedges-Gough Lumber, 337 F.2d 24, 27 (8th Cir. 1964); Williams v. Rogers, 449 F.2d 513, 518 (8th Cir. 1971).

** Civil Rights Cases, 109 U.S. 3 (1883); Hall v. Garson, 430 F.2d 430, 439 (5th Cir. 1970).

In sum, the State is significantly involved in the challenged activity because section 210 of the Uniform Commercial Code reverses the common law and grants the warehouseman a power he does not otherwise have, so that when he sells or threatens to sell bailed goods, he acts under and only under section 210. In addition, the sale of bailed goods constitutes the execution of a lien, a function which historically and traditionally in New York has been the public function of the sheriff.

POINT II

NEW YORK UNIFORM COMMERCIAL CODE §7-210 VIOLATES THE DUE PROCESS CLAUSE BECAUSE IT AUTHORIZES THE SALE OF BAILED GOODS WITHOUT AFFORDING THE OWNER AN OPPORTUNITY TO BE HEARD AT ANY TIME.

This action presents a classic case of a taking of property without any procedural due process safeguards. Section 210 of the Uniform Commercial Code authorizes a warehouseman to sell bailed goods to recover warehouse fees allegedly due without affording the owner of the goods an opportunity to be heard at any time. Plaintiffs contend that the warehouseman's sale of bailed goods without affording the owner a judicial hearing violates the Due Process Clause. North Georgia Finishing Co. v. Di Chem, 95 S.Ct. 719 (1975); Mitchell v. W.T.Grant, 416 U.S. 600, 94 S.Ct. 1895 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Hernandez v. European Auto Collision, 487 F.2d 378 (2d Cir. 1973).*

* Accord, Hall v. Garson, 468 F.2d 845 (5th Cir. 1972); Caesar v. Kiser, 387 F.Supp. 645 (M.D.N.C. 1975); Lee v. Cooper, CCH Pov.L.Rptr., ¶19, 216 (D.N.J. 1974); Cockerel v. Caldwell, 378 F.Supp. 491 (W.D.Ky. 1974)(three-judge court); Mason v. Garris, 369 F.Supp. 420 (N.D.Ga. 1973) (three-judge court)(mechanics' lien); Stralev v. Gassaway Motor Co., 359 F.Supp. 902 (S.D.W.Va. 1973); Collins v. Viceroy Hotel Corp., 338 F.Supp. 390 (N.D.Ill. 1972); Klim v. Jones, 315 F.Supp. 109 (N.D.Calif. 1970); Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15 (1973); Adams v. Dept. of Motor Vehicles, 113 Cal.Rptr. 145, 520 P.2d 961 (Cal.Sup.Ct. 1974); Quebec v. Bud's Auto Service, 32 Cal.App. 3d 257 Cal. Ct.App. 1973); Jones v. Banner Moving and Storage, 78 Misc. 2d 762 (N.Y.Sup.Ct. 1974), rev'd on other grounds, 48 App. Div. 2d 928 (2d Dept. 1974).

The sale provision of the warehouseman's lien statute works a deprivation of property that is total and final without any procedural safeguards. As the record substantiates, the sale of essential goods, like the wage garnishment in Sniadach, can "impose tremendous hardship" on the owner of the goods. Sniadach v. Family Finance Corp., supra at 340-341.

In Hernandez v. European Auto Collision, supra, Judges Timbers and Lumbard, concurring, concluded that the sale provision of the New York garageman's lien law, which is virtually identical to the sale provision of the warehouseman's lien law, violated the Due Process Clause. In reaching this conclusion, they determined that the decision in Magro v. Lentini Bros. Moving and Storage,* which upheld the constitutionality of the warehouseman's lien statute, could no longer be regarded as good law.

Magro was decided after Sniadach but prior to Fuentes v. Shevin, supra. It upheld the warehouseman's power of sale without affording the owner an opportunity to be heard on the basis of (1) a narrow reading of Sniadach, i.e., it applied only to necessities, and (2) the fact that the owner voluntarily transferred possession of his property to the bailee. The concurring

* 338 F.Supp. 464 (E.D.N.Y. 1971), aff'd per curiam on opinion below, 460 F.2d 1064 (2d Cir.), cert. denied, 406 U.S. 961 (1972).

opinion in Hernandez concluded that these two factors are not sufficient to deprive the owner of an opportunity to be heard. First, "the 'necessities' distinction surely was put to rest in Fuentes v. Shevin, 407 U.S. 67 (1972)." Hernandez v. European Auto Collision, supra at 384; Fuentes v. Shevin, supra at 88-89. Second, with respect to the voluntary transfer:

> "...it is true that appellant voluntarily delivered his car for the purpose of temporary storage and perhaps eventual repair. But it cannot be seriously contended that at the same time he voluntarily relinquished his property interest in the car. Indeed, the law is clear that, while a bailment creates a new property interest in the bailee, it does not divest the bailor of his continuing interest and title. e.g., Maulding v. United States, 257 F.2d 56, 60 (9th Cir. 1953). I find little, if any, significance in the fact that the initial delivery of the car was voluntary." Hernandez v. European Auto Collision, supra at 385.

In addition, the concurring opinion in Hernandez found that the deprivation of property pursuant to the garageman's lien law was more drastic than the deprivation by replevin in Fuentes.* The sale provision

* Indeed, in Fuentes, the Supreme Court held that even the temporary non-final deprivation of property is a deprivation protected by the Fourteenth Amendment. Fuentes v. Shevin, supra at 84-85. In this respect Spielman Fond v. Hansons, 379 F.Supp. 997 (D.Ariz. 1973), aff'd, 417 U.S. 901 (1974) is readily distinguishable. The court there viewed the imposition of a mechanics' lien against realty as only a de minimus taking.

of the warehouseman's lien statute, like the garageman's lien law, "permits the permanent deprivation of a significant property interest without a prior hearing...." Hernandez v. European Auto Collision, supra at 385. In addition, the Hernandez court concluded that the replevin provision held unconstitutional in Fuentes provided greater procedural safeguards than the sale provision of the garageman's lien statute

> "Comparing the Lien Law here to the replevin statutes struck down in Fuentes there would appear to be an even greater disregard for the basic elements of due process. The sale of the liened goods, for example, completely extinguished the possibility of any future right of repossession in the event of ultimate success on the merits; replevin, in contrast, is a provisional remedy intended to preserve the integrity of the goods pending trial on the underlying claim. Moreover, a common law replevin provision requires that an action on the merits be commenced contemporaneously by the creditor; the Lien Law, on the other hand, permits the enforcement of the lien, and the liquidation of the goods, without any judicial review at any stage. (footnote omitted)." Id. at 385.

This analysis is fully applicable to the warehouseman's lien statute.

The Supreme Court's decision in Mitchell v. W.T. Grant Co., supra, does not alter the validity of the conclusions reached in Hernandez. Jones v. Banner Moving and Storage, 78 Misc.2d 762, 774 (N.Y.Sup.Ct. 1974), rev'd on other grounds, 48 App.Div. 2d 928 (2d Dept. 1974).

See North Georgia Finishing v. Di Chem, supra. In Mitchell, the Supreme Court specifically stated that i .s prior decisions in Sniadach and Fuentes require that "a hearing must be had before one is finally deprived of his property...." Mitchell v. W.T. Grant Co., 94 S.Ct. supra at 1902. The Mitchell decision deals only with the limited issue of the procedures required upon a temporary deprivation of property where both parties have significant property interests. Here, in contrast, the taking consists of a complete and final deprivation of goods owned exclusively by the bailor.

In Mitchell, the creditor's application under state law involved "uncomplicated matters that lend themselves to documentary proof." Id., at 1901. Here, the validity and amount of the alleged debt are subject to serious factual dispute. Plaintiffs and defendants are in dispute as to (1) whether an initial contract for the storage of goods was voluntarily entered into between the parties; (2) the terms of the agreement between the parties; (3) the validity of the warehouseman's rate changes; and (4) other subsequent modifications of the initial contract.

(A.124-129,140-144,175-182,202-204).* These are factual issues which should be resolved at a hearing.

In Mitchell, the court found that a procedure existed under state law that safeguarded the alleged debtor's interest, and for this reason found that the challenged statute comported with due process. The procedure required the creditor to make application to a judge and post a bond and affidavit to show the danger that the debtor might transfer or destroy the property.** The debtor could immediately apply to the judge and could regain his goods either by posting a bond, or if the vendor failed to meet his burden of showing a danger of destruction or transfer. In addition, the creditor was obliged to institute a plenary action to prove the validity of his claim. Mitchell v. W.T.Grant Co., 94 S.Ct. supra at 1899, 1900, 1901, 1905.

The factors and controls present in Mitchell are absent in this case. Jones v. Banner Moving and Storage, Inc., 78 Misc. 2d supra at 773. There is no requirement that the warehouseman apply to a judge;

---

* See East Coast Moving and Storage v. Flappin, 78 Misc. 2d 140, 141 (N.Y.C. Civil Ct. 1974)("This case illustrates how New Yorkers are being victimized by unscrupulous truckers of household goods... [W]hen the moving job is completed the bill presented bears no resemblance to the estimate.").

** In Mitchell, the Supreme Court found that the danger of destruction or transfer was an important factor, since under Louisiana law, such conduct would result in the expiration of the lien. Mitchell v. W.T.Grant Co., supra at 1901. This factor is not present in this case.

> "there are not even sworn ex parte documents submitted to minimize the risk of a wrongful lien; ...the statute does not provide for an immediate hearing or a bond, and no final judgment need be obtained before a sale." Jones v. Banner Moving and Storage, 78 Misc.2d supra at 773.

And, the warehouseman can sell the goods without even instituting an action to prove the validity of his claim.

Defendant Flagg claims that Uniform Commercial Code §7-210(3) protects the owner of the goods. This provision provides:

> "Before any sale pursuant to this Section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this Section. In that event, the goods must be retained by the warehouseman subject to the terms of the receipt and this article." (emphasis added).

The "amount necessary to satisfy the lien", however, is the amount the warehouseman claims is due for storage, transportation and other charges. N.Y.Uniform Commercial Code, §7-209(1). If there is a dispute as to whether or how much the owner of the goods owes the warehouseman, the warehouseman has the ex parte power to impose and enforce his lien by selling the goods, without affording the owner an opportunity to

be heard. Jones v. Banner Moving and Storage, supra at 763-764.*

In sum, the owner of bailed goods has no procedural protection against an arbitrary or wrongful sale of his goods. New York Commercial Code, §7-210 violates the Due Process Clause because it authorizes the warehouseman to sell bailed goods without affording the owner an opportunity to be heard at any time.

* The owner has a remedy of a post-sale action for damages for conversion based on an alleged wrongful sale. See generally, 62 N.Y.Jurisprudence, Warehouse Receipts, §165. This does not, however, satisfy due process requirements. Hernandez v. European Auto Collision, supra at 385.

POINT III

THE ACTION IS A PROPER PLAINTIFF AND DEFENDANT CLASS ACTION PURSUANT TO RULE 23(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The parties stipulated to the propriety of the plaintiff and defendant classes. (A.33-34a,121-123). However, apparently because of the confusion which resulted from the fact that the case was assigned to three different district judges, the class action stipulations were never "so-ordered" by the court. Therefore, when plaintiffs moved for summary judgment, they also moved for a class action determination. (A.112-114). In its decision of June 7, 1975, the court did not expressly deal with the propriety of the motion for class certification, but appears to have treated the action as a proper class action. (A.218). The court simply endorsed "motion denied" on plaintiffs notice of motion, which, in view of the court's decision, apparently refers to the summary judgment motion. (A.205). Plaintiffs contend that the action is a proper plaintiff and defendant class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

A. Plaintiff Class.

All of the requirements of subdivision (a) of Rule 23 are all satisfied in the instant case. That the numerosity requirement of Rule 23(a)(1) is met is substantiated by the fact that there are 200-300 warehouses in New York State. (A.122). All of these warehouses operate under the challenged statute. This Court can take judicial notice of thousands of liens imposed, sales and threats of sale pursuant to the challenged statute.*

The question of law involved is identical as to all members of the plaintiff class, all of whom claim that the challenged statute violates the Due Process Clause. Fed.R.Civ.P., 23(a)(2). All members of the defendant class can reasonably be expected to contend that the statute is consistent with the Due Process Clause. While the underlying factual circumstances of the various members of the class may vary, the procedural due process claim constitutes the common question of law that satisfies the requirement of subdivision (a)(2). Frost v. Weinberger, 515 F.2d 57, 62-65 (2d Cir. 1975); Escalera v. New York City Housing Authority, 425 F.2d 853, 867 (2d Cir.), cert. denied, 400 U.S. 853 (1970); Milne v. Berman, 384 F.Supp.

* Defendant Flagg's Answers to Interrogatories state that in 1973, Flagg gave its customers approximately 65 "Final Notices" of Sale, and "there were approximately 18 sales." (A.38).

206, 213 (S.D.N.Y. 1974)(three-judge court); Lynch v. Household Finance Co., 360 F.Supp. 420, 422 (N.D.Ga. 1973); Burr v. New Rochelle Municipal Housing Authority, 347 F.Supp. 1202, 1205 (S.D.N.Y. 1972), aff'd, 479 F.2d 1165 (2d Cir. 1973); Santiago v. McElroy, 319 F.Supp. 284, 290-291 (E.D.Pa 1970); Pollion v. Powell, 47 F.R.D. 331, 333 (N.D.Ill. 1969).* Similarly, the claims of the named plaintiffs are typical of the claims of the members of the class. Fed.R.Civ.P., 23(a)(3). And, the plaintiffs have and will continue to represent the class adequately.

In addition, the action meets the requirement of Rule 23(b)(2) that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This subdivision was added to Rule 23 to facilitate the class action device in civil rights cases. Wright and Miller, Federal Practice and Procedure, §§1771, 1776. The Advisory Committee Notes to this subsection of Rule 23 state:

---

* Plaintiffs do not object to a modification of the scope of the class to include only consumer transactions where there is no contractual authorization for the sale of the goods.

> "This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class and final relief of an injunctive nature, settling the legality of the behavior with respect to the class as a whole, is appropriate...Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class."

The fact that the threats to sell plaintiffs' goods- which existed when the action was commenced and motion for intervention filed- are no longer present does not diminish plaintiffs' adequacy as class representatives. First, the named plaintiffs' claims for declaratory relief and damages provide a sufficient stake that insures that they will adequately and diligently pursue their claims. Hernandez v. European Auto Collision, 487 F.2d 378, 382, 383 (2d Cir. 1973)("The fact that the sale has already occurred obviously does not make moot the prayer for a declaratory judgment and for damages.")* See, Powell v. McCormack, 395 U.S. 486, 495-497 (1966); Phillips v. Money, 503 F.2d 990, 991 (7th Cir. 1974), cert.denied, 420 U.S. 934 (1975); Parks v. "Mr. Ford", 386 F.Supp. 1251, 1257, (E.D.Pa. 1975); Collins v. Viceroy Hotel, 338 F.Supp. 390, 393 (N.D.Ill. 1972); Klim v. Jones, 315 F.Supp. 109,

---

* In Hernandez, the court held that the sale of the goods did not deprive plaintiff of standing to attack the constitutionality of the sale provision of the garageman's lien law.

117 (N.D.Cal. 1970). Cf. Tucker v. Maher, 497 F.2d 1309 (2d Cir. 1974). Compare, Preiser v. Newkirk, 95 S.Ct. 2330, 2334 (1975)("This is not a class action and Newkirk has not sought damages.").*

Moreover, in virtually every consumer lien case, the goods have either been returned, sold, or retained by defendant pursuant to court order or stipulation, by the time the court renders its decision. See cases collected in Appendix "A" annexed hereto. In addition to the return of the goods to the two named plaintiffs herein, the goods were also returned to the named plaintiff in another action challenging the constitutionality of the contested statute filed in the court below after commencement of this action. Morant v. Alliance Fireproof Warehouse, S.D.N.Y. 73 Civ. 4736 M.I.G., dismissed March 29, 1974. Often the goods are necessaries which the plaintiffs cannot do without during a lengthy litigation period. See, Sniadach v. Family Finance Corporation, 397 U.S. 254 (1970). By the very nature of the controversy, it is extremely unlikely that a threat of sale will continue until the time the trial or appellate court resolves the merits of the case. Recognizing this inherent problem, the courts have adjudicated the constitutional issue not withstanding the sale or return of the goods. E.g., Hernandez v. European Auto Collision, supra; Collins v. Viceroy Hotel, 338 F.Supp. 390 (N.D.Ill. 1972); Klim v. Jones, 315 F.Supp. 109 (N.D.Calif.

* Kerrigan v. Boucher, 450 F.2d 487 (2d Cir. 1971) is readily distinguishable from the instant case. First, the plaintiff in Kerrigan only sought nominal damages. Second, the action was "not a class action." Id. at 489. Third, defendant landlord made no appearance, and "The State of Connecticut which presumably would have...an interest [in upholding the constitutionality of the statute] was not made a party to this action and was not even notified of its pendency." Id. at 489.

1970); Blye v. Globe-Wernicke, 33 N.Y.2d 15(1973);App."A",infra. To hold that the elimination of the threat of sale defeats the power of the court to determine the constitutionality of the sale provision would render the issue "'capable of repetition, yet evading review.'" Supertire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974)(welfare benefits to strikers); Roe v. Wade, 410 U.S. 113 (1973)(abortion); Dunn v. Blumstein, 405 U.S. 330, 333 fn.2 (1972)(voting); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 178 (1968) (First Amendment); Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1971). As then district Judge Gurfein concluded in the court below:

> "Having eliminated Brooks as a plaintiff for injunctive relief, the defendants now seek to eliminate the proposed intervenor Jones by telling her that they have no intention of selling her goods, and that she would, in any event, be notified well in advance of the sale. If the defendants made the same promise each time a plaintiff challenged then, or even gave the goods back each time, they would have a continuing argument that there is no justiciable controversy and that the particular plaintiff had no standing." Brooks v. Flagg Brothers, 63 F.R.D. 409, 413 (S.D.N.Y. 1974)(A.100).*

See, Frost v. Weinberger, 515 F.2d 57, 62 (2d Cir. 1975), citing Goldberg v. Kelly, 397 U.S. 254, 256 n.2 (1972).

Under the circumstances in this case, class certification should not be denied because "technical" certification, i.e., so ordering the class action stipulations,has not preceded the elimination of the threat of sale to the named plaintiffs. Sosna v. Iowa, 419 U.S.

* It should be also noted that in urging the court not to reach the constitutional issue in Jones v. Banner Moving and Storage Co., supra, the Attorney General assured the court that the constitutional issue would be resolved in the instant case. Jones v. Banner Moving and Storage Co., 78 Misc.2d supra at 766.

393 95 S.Ct. 553, 559 n.11 (1975); Gerstein v. Pugh, 420 U.S. 103, 110 n.11, 95 S.Ct. 854, 861 n.11 (1975). Frost v. Weinberger, supra at 62-65; Morales v. Menter, 393 F.Supp. 88, 91 n.5 (D.Mass. 1975)(three-judge court).*

In sum, the plaintiff class is adequately represented and meets all of the requirements of provisions (a) and (b)(2) of Rule 23.

B. Defendant Class.

The defendant class is simply the other side of the coin of the plaintiff class. The challenged statute is either valid or invalid as to all warehouse companies in New York, whose contracts do not contain an authorization of sale clause, in an identical manner. Gibbs v. Titleman, 369 F.Supp. 38, 52-53 at 53. (E.D.Pa. 1973), rev'd on other grounds, 502 F.2d 1107 (3d Cir. 1974). Multiple actions against these different warehouses on the identical issue would be an inefficient use of judicial resources.

* In Frost, Judge Friendly concluded that the requirement of prior class certification "is largely drained by footnote 11" in Sosna v. Iowa, supra. "Frost v. Weinberger, supra at 64. Moreover, the requirement of prior certification is mainly to assure that the class is adequately represented. Id. This is not a factor where the court has deferred its class action determination pending a ruling on the merits. Id. In any case, plaintiffs should not be penalized because the district court failed to comply with Rule 23 (c)(2), which requires the district court to determine the propriety of the class "as soon as practicable after commencement of the action." Fed.R.Civ. P. 23(c)(2). See Morales v. Minter, supra at 91 n.5; Jones v. Diamond, 519 F.2d 1090, 1098 (5th Cir. 1975).

In Gibbs, the court stated:

> "It is the same procedures that form the bond of legal commonality between the plaintiffs and defendants ....The opposing parties here are the respective classes. The defendants as a class, have acted on grounds generally applicable to the plaintiffs' class as a whole...Likewise, but in a converse manner the plaintiffs' actions or inactions are on grounds generally applicable to the defendants' class." Gibbs v. Titelman, supra at 52.

Accord, Anastasia v. Cosmopolitan National Bank, supra (slip opinion, p.3,n.7); Ruocco v. Brinker, 380 F.Supp. 432, 433 (S.D.Fla. 1974)(three-judge court).* And, with the presence of the Attorney General and four warehouseman associations as parties defendants, the defendant class is adequately represented. (A.41-42). Compare Mason v. Garris 360 F.Supp. 420, 422 (N.D.Ga. 1973).

* "There are a number of cases that courts have in fact applied Rule 23(b)(2) to a defendants' class." Gibbs v. Titelman, supra at 53. See, e.g., Samuel v. University of Pittsburgh, 56 F.R.D. 435, 438-439 (W.D.Pa. 1972); Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F.Supp. 279, 291 (E.D.Pa. 1972); United States v. Cantrell, 307 F.Supp. 259, 261 fn. 1 (E.D.La. 1969); Technograph Printed Circuits v. Methode Electronics, 285 F.Supp. 714 (M.D.Ill. 1968).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the action remanded to that court with directions to declare New York Uniform Commercial Code §7-210 in violation of the Due Process Clause.

Dated: October 28, 1975
White Plains, New York

Respectfully submitted,

THE LEGAL AID SOCIETY OF
WESTCHESTER COUNTY
By: Martin A. Schwartz,
of Counsel
Lawrence Kahn, of Counsel
Evelyn Isaac, of Counsel
Attorneys for Plaintiffs-
Appellants
56 Grand Street
White Plains, New York 10601
Tel: (914) 761-9200

APPENDIX "A"

STATUS OF PROPERTY IN PERSONAL PROPERTY DUE PROCESS LIEN CASES.

I. Goods Returned to Owner Prior to Decision.

1. Anastasia v. Cosmopolitan National Bank, __F.2d__, 44 U.S.L.W. 2164 (7th Cir. 1975)(slip opinion,p.3, n.5)(property returned to 2 named plaintiffs; offer to return property to the third named plaintiff rejected).

2. Phillips v. Money, 503 F.2d 990, 991 (7th Cir. 1974), cert.denied, 420 U.S. 934 (1975).

3. Kerrigan v. Boucher, 450 F.2d 487, 488 (2d Cir. 1971).

4. Parks v. "Mr. Ford", 386 F.Supp. 1251, 1253-1254 (E.D.Pa. 1975)(property of three named plaintiffs returned; property of two named plaintiffs destroyed).

5. Collins v. Viceroy Hotel, 338 F.Supp. 390, 392 (N.D.Ill. 1972).

6. Klim v. Jones, 315 F.Supp. 109, 112, 117 (N.D.Cal.1970).

7. Blye v. Globe-Wernicke, 33 N.Y.2d 15, 19 (1973).

II. Goods Sold Pursuant to Statute Prior to Decision.

1. Hernandez v. European Auto Collision, 487 F.2d 318, 382-383 (2d Cir. 1973).

2. Caesar v. Kiser, 387 F.Supp. 645, 646 (M.D.N.C. 1975).

3. Magro v. Lentini Bros. Moving and Storage, 338 F.Supp. 464, 466 (E.D.N.Y. 1971), aff'd per curiam on opinion below, 460 F.2d 1064 (2d Cir.), cert.denied, 406 U.S. 961 (1972).

4. Adams v. Dept. of Motor Vehicles, 113 Cal.Rptr. 145, 520 P.2d 961 (Cal.Sup.Ct. 1974).

III. Goods Retained By Bailee Pursuant to Court Order, Agreement, or Voluntarily.

1. Smith v. Bekins Moving and Storage Co., 384 F.Supp. 1261, 1262 (E.D.Pa. 1974) (preliminary injunction issued).

2. Cockerel v. Caldwell, 378 F.Supp. 491, 493 (W.D.Ky. 1974) (three-judge court) (temporary restraining order issued).

3. Mason v. Garris, 360 F.Supp. 420, 422 (N.D.Ga. 1973) (three-judge court) (temporary restraining order issued).

4. Straley v. Gassaway, 359 F.Supp. 902, 903 (S.D.W.Va. 1973) (agreement of parties that goods will not be sold pendente lite).

5. Jones v. Banner Moving and Storage, 79 Misc.2d 762, 765 (N.Y.Sup.Ct. 1974), modified on other grounds, 48 App.Div. 2d 928 (2d Dept. 1975) (agreement of parties that goods will not be sold pendente lite).

There was no indication of the present status of the goods in Davis v. Richmond, 512 F.2d 252 (1st Cir. 1975), Melara v. Kennedy, 43 U.S.L.W. 2094 (N.D.Calif. 1974) and Lee v. Coor, CCH Pov.L.Reptr. ¶ 19, 206 (D.N.J. 1974).

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT No. 75-7437

Index No.

SHIRLEY HERRIOT BROOKS, et al.,
Plaintiffs-Appellants,

against

FLAGG BROTHERS, INC., et al.,
Defendants-Appellees.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF WESTCHESTER *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Highview Terrace, Pleasantville, New York.

That on October *19*75 *deponent served the annexed*
Brief for Appellants
on Hon. Louis J. Lefkowitz, Attorney General, Att.: A. Seth Grenawald, Esq.,
attorney(s) for Defendants
in this action at Two World Trade Center, New York, New York 10007
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in ~~a post office~~ an *official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

Sworn to before me
this 31 day of October, 1975.

Martin A. Schwartz

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-3555455
Qualified in Bronx County
Certif. filed in New York County
Commission Expires March 30, 1977

Kitty L. Huebbe
The name signed must be printed beneath

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss :

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 *deponent served the annexed*

on
attorney(s) fo
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a st office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT No. 75-7437

Index No.

SHIRLEY HERRIOT BROOKS, et al.,
Plaintiffs-Appellants,

against

FLAGG BROTHERS, INC., et al.,
Defendants-Appellees.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF WESTCHESTER *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Highview Terrace, Pleasantville, New York.

That on October *1975 deponent served the annexed*
Brief for Appellants
on Brodsky, Linett & Altman, Esqs., Att.: Irving Altman, Esq.,
attorney(s) for Defendants
in this action at 1776 Broadway, New York, New York 10019
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me
this 31 day of October, 1975.

Martin A. Schwartz

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-3555455
Qualified in Bronx County
Certif - filed in New York County
Commission Expires March 30, 1977

Kitty L. Huebbe
The name signed must be printed beneath
Kitty L. Huebbe

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT No. 75-7437

Index No.

SHIRLEY HERRIOT BROOKS, et al.,
Plaintiffs-Appellants,
~~Plaintiff~~

against

FLAGG BROTHERS, INC., et al.,
Defendants-Appellees.
~~Defendants~~

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF WESTCHESTER *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Highview Terrace, Pleasantville, New York.

That on October *19*75 *deponent served the annexed*
Brief for Appellants
on Werner & Weiss, Esqs.,
attorney(s) for Defendants
in this action at 2 West 45th Street, New York, New York 10036
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me
this 31 day of October, 1975

Martin A. Schwartz

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-3555455
Qualified in Bronx County
Certif. filed in New York County
Commission Expires March 30, 1977

Kitty L. Huebbe

The name signed must be printed beneath

Kitty L. Huebbe

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF *ss.:*

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on *19* *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT No. 75-7437

Index No.

SHIRLEY HERRIOT BROOKS, et al.,

Plaintiffs-Appellants,

~~Plaintiffs~~

against

FLAGG BROTHERS, INC., et al.,

Defendants-Appellees.

~~Defendants~~

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF WESTCHESTER *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Highview Terrace, Pleasantville, New York.

That on October *19* 75 *deponent served the annexed*

Brief for Appellants

on Jaffe, Shaw & Rosenberg, Esqs.,

attorney(s) for Defendants

in this action at 51 Madison Ave., New York, New York 10010

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in ~~a post office~~ an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

this 31 day of October, 1975

Martin A. Schwartz

MARTIN A. SCHWARTZ
Notary Public, State of New York
No. 03-3555455
Qualified in Bronx County
Certif[illegible] filed in New York County
Commission Expires March 30, 1977

Kitty L. Huebbe

The name signed must be printed beneath

Kitty L. Huebbe

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law